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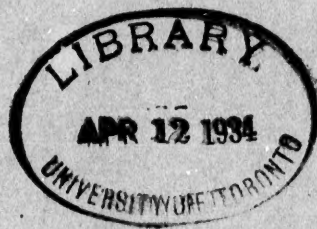
Medical Evidence in Courts of Law.

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By DANIEL CLARK, M. D.,

Superintendent of the Asylum for the Insane, Toronto, Ontario.

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[From the *American Journal of Insanity*, for January, 1879.]



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*Medical Evidence in Courts of Law.**

BY DANIEL CLARK, M. D.,

Superintendent of the Asylum for the Insane, Toronto, Ontario.

Any one, who has paid even a superficial attention to medical evidence given in courts of law, must have noticed, from time to time, how easily medical witnesses can be procured to give evidence on both sides of a case. It matters not how clear may be the merits of the question, nor how little ground exists for difference of opinion, yet, medical men are found who will give positive testimony on either side, at the shortest notice, and on very flimsy premises. Lawyers take advantage of such conflict of opinion, and set up one medical man against another, until both judge and jury value the evidence by the reputed credibility and professional standing of each, and virtually neutralize the evidence of all by a system of offsets. This only refers to medical opinions, for in respect to facts, all witnesses—lay or professional—stand on common ground, and state what are matters of observation, “without note or comment.” It is true, medical science gives room for great differences of opinion, seeing it has not the exactness of mathematics. Herein lies the error in dogmatizing on much which is so obscure. Many of these varieties of opinion arise from a vain endeavor to explain everything connected with causes of litigation. In the presence of a court and the assembled multitude it may not be pleasant to pronounce our ignorance; yet, in the endeavor to give answers hedged round with vain

* Read before the Canada Medical Association, at Hamilton, Ontario, September 12th, 1878.

hypotheses of all kinds, the medical witness is apt to have unpleasantly forced upon him a display of how little he knows under a cross-examination, and thus what would have been received as competent testimony, if it had been confined to sure opinion, is marred and rendered subject to doubt by the witness pretending to know too much. In the plethora of opinion lies one reason for so much contradictory evidence. It is well never to say more than the question covers, and to be guarded in even doing that, if the interrogation happens not to be relevant to the case at issue.

Another reason is in supposing ourselves as being witnesses for one side only, because we happen to be subpoenaed by one of the parties. The prosecutor or defendant, who calls a medical man, expects him to give *ex parte* evidence. He is paid a miserable pittance to cover railway and hotel expenses; is his testimony not bought and paid for, to be used on the disburser's behalf? This feeling, often involuntary, gets hold of the witness, and, immediately the examination begins, he is on the alert against the wiles of the opposite lawyer, and often unconsciously is put upon the defensive to the injury of the truth. We have all felt this tendency. This position is not intentional, but the badgering of an indiscreet lawyer, may drive a medical witness to defend opinions which may give a coloring to a case not intended at the outset. This bias has to be guarded against. The witness is in court to tell *all*, and *only* the truth, as far as in him lies. It is not for him to think of the result, consequent thereon, to any party. In giving evidence it is not safe to weigh what will be the consequences flowing from its acceptance. "Let justice be done though the heavens fall." Unfortunately medical witnesses, giving opinions based on experience, are looked upon with suspicion by the courts.

J. H. Balfour-Browne, in the last edition of "The Medical Jurisprudence of Insanity," says: "That medical testimony, when received, should be received as of very *inferior worth*." Medical witnesses are said to be "rash," and "to have expressed crude generalizations with an imperturbable effrontery," and that alienist physicians ask to be believed, "with an implicit faith, which is only compatible with the grossest ignorance; lawyers should assert the utter uselessness of the evidence of scientific witnesses in relation to questions of insanity." Lord Campbell says that "hardly any weight should be given to the evidence of skilled witnesses." Judge Davis declares in cases of insanity, "men of good common sense would give opinions worth more than that of all the experts in the country." A book might be filled with such choice quotations. If those who have made this branch of medical research a life long study, are such ignorant and unreliable witnesses, what shall be said of the intelligent thousands and tens of thousands in general practice?

It is also to be remembered, in cases of damage for malpractice, that each surgeon may have a mode of treatment distinct from any other, but sufficiently practical to be approved of in general practice, by any intelligent physician or surgeon. This treatment may be denounced by some one who is not able, from experience, to test its value, and an unlettered jury may decide the merits of the case in its professional aspects, by considering one method as only worthy of consideration, and give a verdict accordingly, to the astonishment of those best capable of judging. Next to the inscrutable ways of Providence stand the verdicts of juries, in their uncertainty and unforeseen results. This selection, by non-professional men, of one method of treatment, to the exclusion of all others, has been seen by me on several

occasions. At one time the prosecution was because of a shortened femur, and the merits of the double inclined plane or a straight splint, were decided by a jury selected from one of the back townships. Another was decided in favor of a flap operation as against a circular, the jury being composed mostly of farmers, fresh from the harvest field. Not long since I attended a trial in this city and the jury were treated to clinics on the *dura mater*, *arachnoid*, *pia mater* and their blood vessels. They understood the merits of the case, after several hours of medical dissertations, as much as if the Crown Council had given an address in Choctaw. I envied one jurymen who slept soundly through it all, except when elbowed by a neighbor.

Antagonisms unhappily existing among medical men lead to conflict of opinion. A case comes from a village, a town, or even a city. Observation teaches that the smaller the area from which such evidence is drawn, the stronger are the contentions in the locality, and the more likely does it become that sides are taken before the suit goes to court. It is a matter of every day experience that in a majority of cases, such a locality will furnish medical evidence for prosecutor and defendant. The reasons already given may have something to do with this diversity of conception. I fear unfriendly feelings, of a professional nature, must sometimes be taken into account. To the honor of our profession it is seldom that false testimony is given from motives of revenge. Animosity against a professional brother seldom reaches perjury, yet, a love of establishing proof on a different basis from that of a rival, often leads to false conclusions, not intended by the witness. If this itching for novelty leads to wrong impressions, they are still farther intensified by ambiguity, which may be caused by unnecessary economy of words, or

by the other extreme of profuseness of illustration, not conducive to perspicuity. Such being the case, a court refuses to reconcile contradictions among those who are supposed to know the merits of the case.

The late Lord Campbell said to three intelligent physicians, "you may go home to your patients, and be more usefully employed there than you have been here!" An equally learned judge said of another doctor, who was well qualified to give good evidence, "you might as well have staid at home and attended your patients." A Vice Chancellor of the Empire stated "that his experience taught him there were very few cases of insanity, in which any good came from the examination of medical witnesses. Their evidence sometimes adorned a case, and gave rise to very agreeable and interesting scientific discussions; but, after all, it had little or no weight with a jury." All judges do not sneer in the same manner, nor indulge in irony and sarcasm at the expense of the medical profession, but the weight given to a physician's or a surgeon's testimony is not commensurate with his capability to give intelligent and experienced medical opinions. I can see, however, indications of a better understanding between medicine and law. The study of the obsolete is giving place to the practical, and metaphysical distinctions, to pathological conditions, in considering many of the exciting causes of human conduct, coming under the head of jurisprudence. It will be seen how medicine and law are considered from different stand-points, and as a consequence the conclusions are diametrically opposite to one another. Medicine holds that all insane persons are afflicted with bodily disease. Law says this is not always the case. Medicine draws a necessary line between idiocy and insanity—the one being congenital, and the other pathological. Law says they are

one. Medicine declares that insanity, being a morbid state, no layman can properly pronounce judgment upon a patient's condition, nor in respect to facts that rise therefrom. Law asserts that a jury can, and should decide on the mental condition of the insane, based upon personal observation, just as an ignorant man would pronounce on the kind of disease a person had, from appearances alone. Medicine can show from living examples that the sense of right and wrong, the possession of delusions, and many other tests propounded by the disciples of Coke and Blackstone, can have no value to discover insanity, when taken alone, for many insane have a keen sense of the former, and many not insane are troubled with the latter. Law says possession of the first is evidence of a sound mind, but the presence of the other shows insanity. Medicine extends the hand of charity to the mentally diseased, and asks that such be kept in durance for the purpose of cure or safety to themselves or others. Law applies its iron-clad tests, and punishes all who can not pass the crucial ordeal. Medicine seeks after causes of action. Law deals out justice on the ground-work of appearances. Experts are called into court to testify in cases requiring the special aid of knowledge in chemistry, mechanics, or any other branch of science and art, and such testimony is accepted in its entirety; but medical men who make a special study of mental diseases, must have their opinions measured by the mental capacity of twelve jurymen, or worse still, by the dicta of judges, who accept rules laid down a century ago, when medical research was still in its infancy. Germany, France, and many of the States of the Union have accepted the medical basis of proof. It is expected that the British and Canadian courts will not ignore a system, that in every day practice will be found to be none

the less effective in punishing the guilty, while it will save many a poor wretch from the infliction of a punishment which he had not deserved, as an irresponsible being, any more than a child unborn.

Judge Doe, of New Hampshire, in addressing the jury, *State vs. Pike*, says:

"The legal profession, in profound ignorance of mental disease, have assailed the superintendents of asylums, who know all that was known on the subject, and to whom the world owes an incalculable debt, as visionary theorists or sentimental philosophers, attempting to overthrow settled principles of law; whereas, in fact, the legal profession were invading the province of medicine, and attempting to install old, exploded medical theories, in the place of facts established in the progress of scientific knowledge. The invading party will escape from a false position, when it withdraws into its own territory, and the administration of justice will avoid discredit when the controversy is thus brought to an end."

Judge Wharton, in his work on "*Criminal Law*," says:

"No juryman, if properly tender of his conscience and of public opinion, will base his verdict upon other evidence than that of those best able, from long training, and close attention, to understand the features of the case. In some cases the difference between a scientific, or technical opinion, and that of a layman, is not so much in the results attained, as in the guarantee afforded by the superior attainments and more minute expertness of a man of science. The declaration of such a man is insured against the possibility of error to the full extent of the protection of science in its present state of development. *Pro foro*, this degree of certainty is sufficient, because it is the highest attainable; but, the same can not be said of any other."

I make these few general observations to show that our position in court would be much improved did caution, consistency, discretion, good judgment and candor prevail to a greater extent among ourselves. This would more readily be the case were all medical

men, who might be subpœnaed upon a case, to meet together before being called as witnesses and in a calm, judicial way, discuss the different medical points bearing upon the approaching trial, and then go into the witness box, not as partisans "coached" for the occasion by counsel, but as unbiased witnesses, who "nothing extenuate nor set down aught in malice." These qualities are needed very much in the witness who gives evidence in cases of insanity. In most of such cases found on the criminal docket the disease is obscure, and to "make haste slowly" is very necessary, that judgment may be just. The defendant may be a malingerer or a monomaniac, who cunningly hides his peculiarities, as many of them do. Such may be afflicted with melancholia, giving intelligent answers to questions, yet possessing homicidal or suicidal tendencies. The medical witness is often asked to give an opinion of the mental condition of such a person after a few minutes observation and conversation, or at most after one or two interviews of short duration. There would be no difficulty in doing this were a patient maniacal and indulging in all kinds of "fantastic tricks," but any one who has passed through the wards of an asylum knows that a very large proportion of the patients are not of this class. Visitors and grand juries often mistake patients for attendants, and *vice versa*. A few weeks ago an intelligent banker of Toronto wrote to me a letter beginning with these words: "The *housekeeper* mentioned to me yesterday." He had been a visitor to the ward every few days for weeks to see a sick friend; yet he mistook one of the most cunning patients in the ward for the housekeeper, and had been consulting him about matters connected with the patients. He was somewhat astonished when told that the *housekeeper* was at times one of the most intract-

able patients in the ward. A short time ago one of our city lawyers, who prides himself on his power to read almost intuitively the hieroglyphics of character, and who, in his own estimation, could tell an insane person at sight, mistook one of my clinical assistants for a lunatic, and commiserated him on his unfortunate condition. He afterwards came to me for information about "the poor fellow," as he had taken a deep interest in his forlorn and apparently hopeless condition. His pride had a fall when the truth came out. A prominent government official, not long since, mistook one of my most intelligent-looking attendants for a patient. I am prepared at any time to select say twenty-four intelligent attendants or citizens, and twenty-four patients out of Toronto Asylum, and present them to any court of law before our most eminent judges, lawyers and jurymen. They will be allowed to make the same superficial examination which is often accorded to medical men in similar circumstances. The selection of patients shall be made from paretics in the early stage of the disease, from those afflicted with remittent insanity, from the melancholy and taciturn, and from monomaniacs. The judgment given of the mental condition found in each case, by such an intelligent and acute Board of Examiners, would show in a comical light what a travesty of justice it is to ask, even an expert, to give an opinion of mental unsoundness, or sanity, after a cursory examination of a prisoner. About a year and a half ago I was called to attend the assizes in a neighboring county and asked to decide in a few hours the *mental status* of a prisoner, who had attempted to take the life of his neighbor by shooting him. The houses of the two parties were near together, being situated on opposite sides of a country road. The prisoner cut a hole in the gable end of his house, and being a bachelor living

alone, no one saw him cut the hole or shoot. He shot twice at his neighbor, the last shot taking effect in his lung, but not fatally. Every one of the prisoner's acquaintance, lay and medical, thought him eccentric, but perfectly sane. The first two interviews I had with him, I was led to suppose the same. He could talk intelligently on every topic of conversation that was introduced, but would give no reason at first for the attempted homicide. At the last interview I had with him we began to discuss religious matters. Suddenly he asserted with great solemnity, and with a request to keep it a secret, that he was more than human. I suggested that possibly he might be God in human form. He asserted that I had found out the truth. He was omnipotent, and consequently could do what he wished. He had often lived sixty days at a time without food, to show that Christ's fasting of forty days was not a miracle. When he got out of gaol he intended to fast a year. He had been shot at with bullets by his enemies as he went along the road, or worked in the fields, but having an immortal body they could not harm him. We were sitting on a bed and I suggested that he might be smothered to death, but he said that he could live without breath. If his head were cut off it would not affect him. He could make himself invisible whenever he pleased. Every one's life was in his hands, and the wife of the man he shot was his by his divine right to her. Here it will be seen that a morbid idea led to the attempt at homicide. Had I not happened to touch the key that opened the door to this chamber of fantasies, these aberrations would not have been developed. I was subpoenaed by the Crown, but the Queen's council knowing that my opinion would be that this man showed evidence of insanity, I was not put in the wit-

ness box. The defence had not sufficient acumen to see that this refusal to examine me by the prosecution was presumptive evidence of my opinion being inimical to the case of the Crown council. The prisoner was treated as a sane man and a criminal. He is now in the Penitentiary Asylum. This case is cited to show the danger of hasty conclusions in cases of insanity, and the difficulties medical men have to contend with when asked to decide the mental condition of a prisoner at a few hours' notice. What shall be said of the jury who must give a verdict based upon conflicting opinions, and not upon personal knowledge of the condition of the accused? Some time ago the Commissioners in Lunacy in Britain wisely recommended to the government that "If, upon the occasion of the trial of an indictment, the plea of insanity be set up, we are disposed to think that the question should be tried and determined by the court after taking medical and other evidence, and not by the common jury to try the facts."

An eminent English expert (Bucknill) says:

"Generally the physician giving evidence can almost say that he paid *two or three* visits to the accused, and conversed with him in his *cell* in prison. In case of concealed delusions, or of disease affecting the propensities, no medical man ought to give an opinion on such shallow grounds. I am not ashamed, he continues to say, to acknowledge that I have observed patients *daily* for *several weeks* without being able to detect existing delusions."

The Court has too high an estimate of the discerning power of the members of the medical profession. It must be remembered that there is no well-defined line between sanity and insanity. No man can tell where the one begins and the other ends. That belongs to omniscience, for we can only infer from manifestations what are the pathological conditions of the brain, and mental disturbance consequent therefrom. A witness

should never give a positive opinion in obscure cases, for it must be remembered that while it is unjust to punish an irresponsible person who breaks the law, it is also not desirable that a cunning scoundrel should escape the just penalty of his crimes under a false plea sustained by medical evidence. We are not allowed to state as to a man's responsibility. The Court decides that important point. Here lies a wide gulf between law and medicine, and, because of its existence, truth has suffered. No formula can cover all the phases of insanity, nor can a measure be found that is sufficiently accurate to map out the boundaries of responsibility, and say to it "hither shalt thou come and no farther." All the conditions, physical and mental, of each individual must be known before the springs of action can be gauged with certainty in the shadowy borderland of insanity. "Is there insanity?" asks the Court of the medical witness. "Is he responsible?" is an enigma for the judge and jury to solve.

Bucknill, in his monograph on Lunacy, quotes a vigorous writer in the London *Times* on this point:

"Nothing can be more slightly defined than the line of demarkation between sanity and insanity. Physicians and lawyers have vexed themselves with attempts at definition in a case where definition is impossible. There has never yet been given to the world anything in the shape of a formula upon this subject, which may not be torn to shreds in five minutes by any ordinary logician."

Make the definition too narrow, it becomes meaningless; make it too wide, the whole human race are involved in the drag-net. In strictness, we are all mad when we give way to passion, to prejudice, to vice, to vanity; but if all the passionate, prejudiced, vicious, and vain people in this world are to be locked up as lunatics, who is to keep the key of the asylum? As was very fairly observed, however, by a learned Baron

of Exchequer, when he was pressed by this argument, if we are all mad, being all madmen, we must do the best we can under such untoward circumstances. There must be a kind of rough understanding as to the forms of lunacy which can't be tolerated. We will not interfere with the spendthrift, who is flinging his patrimony away upon swindlers, harlots and blacklegs, until he has denuded himself of his possessions and incurred debt. We have nothing to say to his brother madman, the miser, who pinches his belly to swell the balance at his banker's—being seventy-three years of age and without family—but if he refuses to pay taxes, society will not accept his monomania as pleadable at the bar.

Dr. Forbes Winslow, in his "Anatomy of Suicide," says:

"A man may allow his imagination to dwell on an idea, until it acquires an unhealthy ascendancy over his intellect. Surely, if under such circumstances, he were to commit a murder, he ought to be held as a murderer, and would have no more claim to be excused than a man who has voluntarily associated with thieves and murderers until he has lost all sense of right and wrong; and much less than one who has had the misfortune, of being born and bred among such malefactors."

This wide definition could not be of practical benefit, because bias, confirmed habit, hereditary wickedness, oddity and peculiarities, may be normal and the natural out-crop of successive voluntary acts by our progenitors or ourselves. In other words they are not the products of physical or mental disease, and are more or less the inheritance or acquisition of every one. This law of interpretation would include a large number of the insane as responsible beings. There are times in the lives of many lunatics when they not only know right from wrong (the distinctive Shibboleth of so many judges to the present day), but also when they can refrain from

wrong doing, for fear of punishment, as rational beings do in every day life. They can curb the insane impulse by volitions which are within their control. Should they be exempt from penal consequences? The asylums are full of inmates, who for weeks together, are—as far as human knowledge goes—comparatively sane. Their insanity is periodic. In the intermissions of sanity such have full control over all their acts, and are cognizant of their relationship to society. The equilibrium of the mind at such times, as far as we can judge, is maintained, and such are quite capable to transact business, to bear injuries with equanimity, and forbear from any overt acts as any perfectly sane citizen. If at such times, and during such intermissions the individual commits a felony should he be held responsible and punished for his crime? I am well aware that objection may be raised that during these so called “lucid intervals” the mind does not fully recover its normal tonic. This may be true to some extent in many cases, but if the mind have not all the strength of a totally sane man, in vigorous mental health, it has sufficiently recovered, at these times, to perform all its necessary work in the same manner and within the same control as the great majority of mankind. It is proposed to medical men, in view of these difficulties, to confine the definition of insanity to mean brain disease. In this way the question of responsibility would still remain with the Court. If by disease is meant organic lesion, then would the definition be too limited; for functional derangement will dethrone reason for a time. This is seen in the inhalation of anæsthetics, in drunkenness, in the wild delirium of fever, and in the effects of many other toxical agents. The brain may become affected functionally, because of excitement in one or more distant organs of the body. This is seen in the klepto-

mania of women at certain menstrual periods. The woman who revels in wealth will become a thief at such times, who would revolt at the thought when the frenzy passes away. It is the love of stealing, not the pleasure of possession alone, that prompts the act. We see the same eccentric causes in puerperal mania, at the climacteric of female life, hysterical mania, nymphomania and such like, which may in their initiatory invasion be excitants and the cause of permanent lesion of the brain in the long run, but none can say that the mischief has not begun outside of the brain. Disease of the brain will cover the large majority of insane. Disease of the body, outside the brain, will show an efficient cause in many. The two combined make a good majority in our asylums, but to say that lesion of the brain only is a complete definition of insanity would not be in accordance with experience. *Post mortems* often show extensive adhesions inside the skull, and serious invasion of disease in the substance of the brains of those who have died of other bodily diseases, but sane to the last. Also many an insane person dies and leaves no evidence of mischief in the head. The exciting cause may affect the encephalon from without, or it may be beyond the research of the pathologist, and can not be a basis to support the definition above given. Even if this definition were correct, it would be impossible to state when it existed except by mental and physical manifestations; then why not accept a formula like that of the German Penal Code, viz.: "An act is not punishable when the person at the time of doing it was in a state of unconsciousness, or of disease of mind, by which a free determination of the will was excluded." This does not reject the idea of bodily disease, but it takes the outward manifestation as an indicator of the mischief

within, just as the hands of a watch point out the condition of the machinery within. It is a question of *will not* and *can not*, of voluntary or involuntary action, or, in other words, had the accused in any particular act sufficient mental strength to control his actions at any time he wished, or was he led blindly and irresistibly, from any cause, to conduct unnatural and unusual for him to do? Properly speaking none are absolutely free. Inherited predisposition, educated bias, confirmed habit, hobby-riding, well-fed ambition, and such like, are manacles to impede volition. The free will of a sane man must always be considered in a modified sense, for the ball and chain are hanging at our limbs, as we are paying the penalty for the transgressions of ourselves and ancestors.

The medical witness is to remember, however, that it is not his province to give a general definition of insanity. He is often entrapped into an attempt to do this, in order to give a council an opportunity to hold him and his opinions up to ridicule. He is asked in derision, "what is insanity?" but he can retort by demanding the catechist to define one of the terms of his own question. The discussion of insanity, in the abstract, must be left to essays and text-books. Only facts and legitimate opinions, deduced from them, are asked for to enable the Court to decide for itself, whether they are such as to warrant the plea of insanity on behalf of the person under consideration. The witness is to guard against being led into defining the insanity of any one, as being a want of power to distinguish *right* from *wrong*. True, many insane people have not that discrimination, but on the other hand, a large percentage of lunatics have that power, as fully as the sound in mind. No jurist, who has the slightest experience of insanity, now holds that view, because it

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flies in the face of accepted facts. An illustrious race of English judges, for centuries past, and down to this hour, pronounce verdicts based on this inadequate judgment. On examining recent charges to the juries of Canada, I see indications of change of opinion, in this respect, among our judges, which are more in keeping with the truths of modern investigation.

In the Toronto Asylum there is an estimable lady, who is afflicted with religious melancholy. She has made several attempts at suicide. She never loses her sense of "the wickedness of the attempt," as she calls it, but the uncontrollable impulse is too strong for her. On one occasion recently she felt the strong desire coming on, and begged to have the leather muff put on her hands, lest she might be forced otherwise to accomplish her design. The courts would hold her to be an accountable being, seeing the sense of right and wrong had not been extinguished. A powerful mulatto is in the refractory ward, who is constantly persecuted with spirits. He has, intermittently, a longing to kill somebody. He knows it is wrong to even think so, and at these times he asks the supervisor to lock him in his room. According to the interpretations of law, should he commit homicide, he ought to be hanged. In another ward is a patient, who was at one time a prominent writer for the press. He is afflicted with chronic mania, of the most pronounced kind. On a recent occasion he told me that he "felt like wanting to kill" one of the patients, against whom he had taken a dislike. He said he knew it was wrong to think so, but cunningly added, "you know I am crazy so they wouldn't hang me." If, unfortunately, such homicide should take place, he should be hanged according to law. Dozens of such cases could be cited in any of our asylums. Dr. Hammond, a reputed expert on insanity, an extensive

writer on the subject, at one time Surgeon General of the United States Army, and now associate editor of *The Journal of Nervous and Mental Disease*, said recently in a discussion which took place on this subject, at a meeting of the "Medico-Legal Society, of New York," "that he is in favor of punishing insane people, just as he would a tiger who went about destroying people. If a lunatic had a homicidal mania he would hang him."* He would not only hang *any* and *all* insane people who killed any one, but he would hang them if they had a mania to kill, even were the deed not performed. This would be an effectual way to make vacancies in our asylums, and would remove perplexing problems from courts of law to the scaffold and the grave. I am sure such a brutal idea will never prevail where humanity exists. One of the theories of the transmigration of souls was, that some one died when each mortal was born, and the soul of the dead one was immediately translated to the new-born child. I am afraid no one died when Dr. Hammond was born. I take this charitable view of the author of such a horrible proposal.

There is reason for caution in a witness, when he is asked to acknowledge that peculiarities of mind may mean insanity and irresponsibility. A man may do a great many strange things, and still have perfect soundness of mind. There is no common standard to measure mentality with, analogous to the yard stick and bushel in the British Museum. Each man must be gauged by himself, in his antecedent conduct and individuality, for among all the sons and daughters of Adam, no two are alike in body and mind. No man can be justly tried by a code of laws, which indulges in vague generalities, on the one hand, or which vaunts an absurd, minute classification on the other. What

* *The Journal of Mental and Nervous Diseases*, July 1878, p. 556, *et seq.*

may seem odd in a naturally quiet and reticent man, may be the usual conduct of him who is "boiling over" with exuberance of spirits. The temperament, peculiarity, bias, habit and mode of thought, of each person must be considered in relation to each history. To expect uniformity in humanity, and judge that one man must act like any or every other man, is the greatest absurdity. This want of sameness must forever bar the way to finding a general definition of insanity. The conditions are too multifarious for us ever to prove mental *status*, with formulæ as definite as those of Euclid.

A witness should not allow himself to be led into a trap by having proposed to him one symptom at a time, and then be asked if each of those indicate insanity. Each symptom might not be characteristic in itself, when the aggregate might be conclusive. When details are asked for the witness must guard himself by insisting on their accumulated weight, to enable him to form an opinion. This may not be necessary in acute cases, when the patient's actions speak louder than words, but the sum total of symptoms is of great importance when the indications are obscure. Many times it is impossible to express, in words, the gait, mode of expression, look and general demeanor of an insane person, so as to impress a court with their forcible significance. Take an example of one of many found in any asylum. A person was once tidy in his habits; is now slovenly. He had a firm step; he has now a shuffling gait. He never decorated his person; he now makes a ring of some material for his finger, or ties it in a button-hole. He was not a keen observer of small things; he now notices and picks up pins, nails, straws, bits of glass, or any other small object that may come in his way, placing them in some corner,

in his pocket, or in any other part of his clothing. He may have had distinct utterance; but he has lost that clear enunciation of words and mumbles them out. He was inquisitive, at one time, as to what was going on around him; he may now listen to a recital of stirring events, and take a momentary interest in them; but it is of short duration. He was active and industrious; but he is now lazy. This recital might be extended indefinitely, but, in short, there is a perversion of the patient's whole character. The medical witness sees a case of dementia, yet, each of the symptoms taken *seriatim*, would have no significance, being without salient points, to an unobservant jury, and even the combined catalogue, would have little force or weight in many courts of law. There may be no delusion apparent; there may be a sense of right and wrong. Sharp questionings may elicit correct and intelligent answers, but a number of changes of character, such as I have enumerated, pronounce an unsound mind; or rather that physical disease has instrumentally impeded the healthful exercise of mental vigor. The ancient aphorism holds true amid all the fluctuations of mental philosophy, *i. e.*, "a sane mind in a sane body." The appearances of disease may be faint, when taken in detail, but to a practiced eye, and to a matured judgment, accustomed to study the faintest outcrop of mental aberrations, those peculiarities tell a tale which may have no weight with the unskilled in the protean forms of insanity.

It is sometimes insisted upon that a categorical answer be given to every question put to a witness. It may be impossible truthfully to do this, because of the form in which the interrogation is put. The examiner is well aware of this fact, hence the bait cunningly thrown out to catch the unwary. For example, were it

asked about a patient, "Did he then refrain from speaking nonsense?" Were the answer "yes" it would imply that he had been speaking it, but had ceased to do so. Were the answer "no" it would mean that he had spoken nonsense, and continued to speak in the same strain up to the time under discussion. Neither answer might be true, for if the patient had not spoken at all, as indicated, the fallacy lay in an assumption which had no existence. It would be begging the whole question, and neither a positive nor negative answer could cover the ground. This is only one specimen of a legion of such questions which often perplex beginners, and are propounded with that object in view, and a negative or positive answer demanded with legal pertinacity. When such traps are set and baited with sagacious design, a state of "masterly inactivity" is best, until the questioner goes back to legitimate interrogation. A medical witness should never quote authorities, nor should he be entrapped into endorsing or refuting such, if they should be presented by council for his consideration. No published books on medical subjects are competent witnesses in court; nor is a witness compelled to give an opinion about the views the authors may advance. The writers themselves are the only legitimate persons who can testify to their theories and beliefs. I have often seen witnesses caught in this way, even before the opposing council could put a veto on the irregularity. "Do you agree with Maudsley in his view on this point?" "How does it happen that Bucknill and you differ in this respect?" "Can you give me Tuke's opinions on the subject under discussion?" "In Ray's Jurisprudence such and such theories are advanced, what do you think about them?" "You have read Taylor, will you state what he says about insanity in respect to competent wills, or suicide,

or homicidal mania?" These are specimen interrogations which may be put, but need not be answered. A refusal to do so will be sustained by the Court. If a witness begins to air his medical lore by quoting authors, he may be able to show his possession of a good memory, but he will not contribute any *facts* of which he is cognizant, through giving lectures on the opinions of others.

The most difficult position a medical man can be put in, is when called up to give evidence in cases of contested wills. The capacity of a testator to make a will and the soundness of mind requisite to make a valid one, are often questions of great difficulty. It should be held generally as essential that the testator should have sufficient mental capacity to comprehend perfectly the condition of his property, his relation to the persons who were or might have been the objects of his bounty, the scope and bearings of the provisions of his will, and a memory of an activity sufficient to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to retain them in his mind for a period sufficient to perceive at least their obvious relations to each other, and to be able to form some rational judgment with relation to them. (*Vide* Rokenbaugh on Testamentary Capacity, *Journal of Nervous and Mental Disease*, July, 1878.) This test will cover all the ground. It does not assert incapacity to eccentric testators, nor those who may be laboring under delusions of facts. Esquirol says: The brain may be affected, but it does not necessarily mean an impairment of the understanding. On the other hand, it was strongly asserted by Lord Brougham, and is now by certain class of thinkers, that *any* insane delusion entirely destroys the mental capacity of a testator to make a competent will. Lord Brougham

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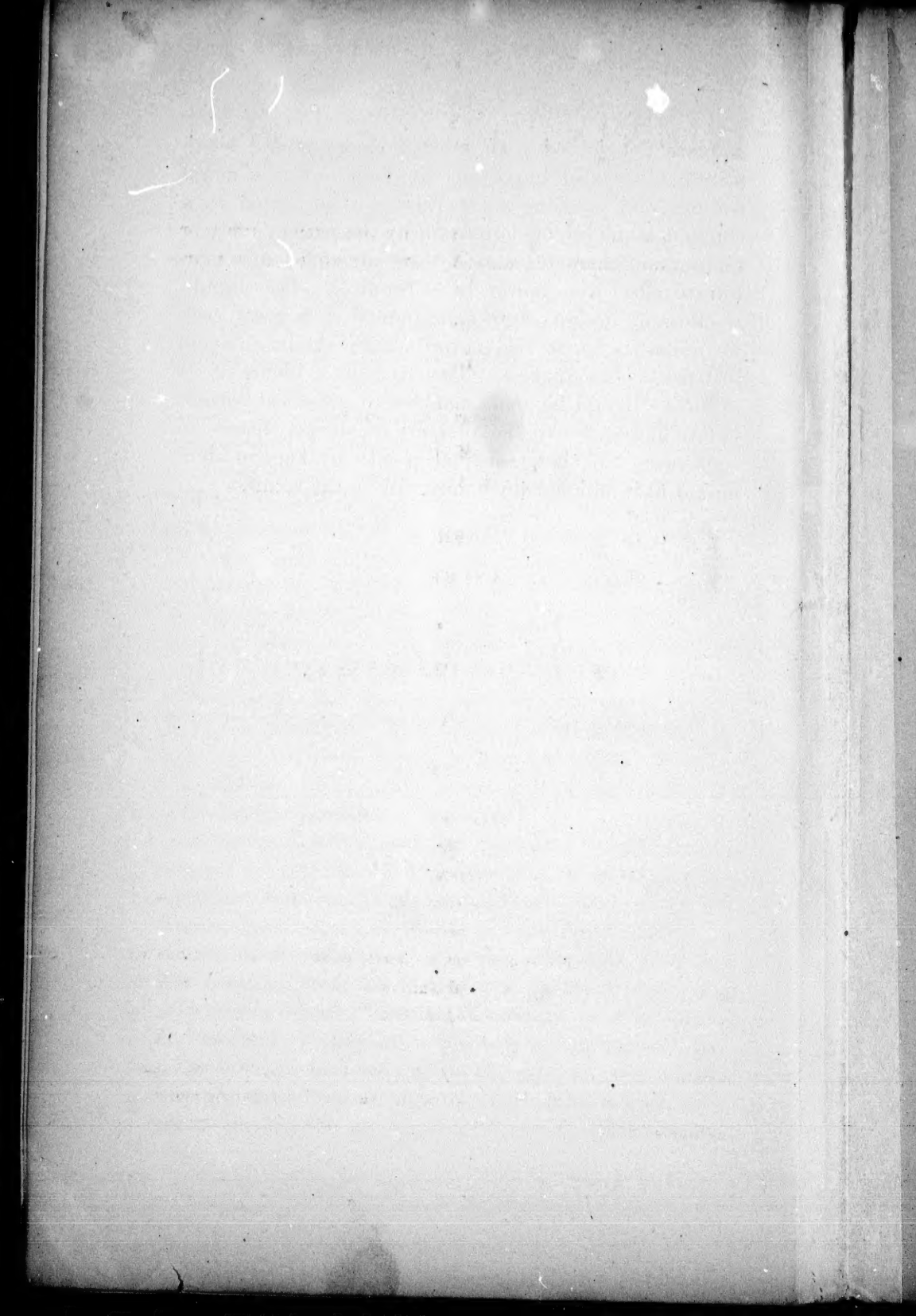
tells us that when travelling in the north of Europe he at one time was taking a bath at his hotel. As he came out of it he saw a friend in the room, who at that time had died in India. He says he became insensible immediately afterwards. This apparition was doubtless the premonition of a fit. His lordship would not have agreed to have the rule of incapacity applied to himself on account of this hallucination. Lincoln had many delusions, so say his biographers. Sir Walter Scott was not exempt from them, when he was in the zenith of intellectual vigor. Dr. Johnson heard his dead mother calling out "Samuel." Lord Castlereagh, the brilliant but corrupt statesman, often saw a beautiful child in his chimney corner. Goethe also positively asserts "that on one occasion he saw distinctly his own double"—or himself outside of himself. General Rapp tells us that Bonaparte saw a star of great brilliancy above his head. Napoleon said: "It has never abandoned; I see it on all great occasions; it orders me to go forward; and it is a constant sign of good fortune." Malebranch, Descartes, Luther, Wesley, Knox, Pascal, Loyola, and many of the most remarkable men of the past ages were the victims of all kinds of delusions and illusions. Yet, these children of genius could not be properly called lunatics, even if genius be said to be nearly allied to madness. There is no doubt, in my own mind, that all such deceptions of the intellect or senses often exist without mental aberration being present of sufficient intensity to invalidate a will.

"At the same time in the consideration of every case imbecility, delusions, monomania, or hallucinations, intoxication, lucid intervals, undue influence or fraud, and presumptions arising from the character of the act itself, the age of the testator, and such bodily infirmities as deafness, dumbness or blindness," must be well

weighed in considering testamentary capacity. Eccentricity is said to be the lowest form of insanity. It is seldom, however, that a will is made invalid because of its existence in the testator. In 1861, a wealthy Portugese died in Paris. He left a will with seventy-one codicils. One of which read "I leave for the Athenæum of Paris 10,000 francs, and the half of the interest shall be paid to a professor of natural history, who shall lecture on the colors and patterns of dresses and on the characters of animals." Another was, "My funeral shall take place at 3 P. M., the hour at which the rooks of the Louvre come home to dinner." The will was held to be valid, the Court saying "that these peculiarities were but the absurdities of a vain man." The peculiarities of the eccentric are as varied as are the phases of the mind, and it has been well said by Redford, in his "Treatise on Wills," that "The *eccentric* man is aware of his peculiarity and persists in his course from choice and in defiance of popular sentiment; while the *monomaniac* verily believes he is acting in conformity to the most wise and judicious counsels; and often seems to have lost all control over his voluntary powers, and to be a dupe and victim of some demon like that of Socrates."

Without entering into details, which would need a volume to elucidate fully, it is well in every case to consider whether the aberrations are such as would warrant us to sign a certificate of insanity to commit to an asylum for treatment and safe keeping. If we do not consider such to be safe at large, they are not responsible beings. We should examine as to delusions and ascertain if they are sufficiently strong to warp the judgment and seriously affect the conduct of the individual; or, if they are of such an insulated nature as not to interfere to an appreciable extent with volition,

and are not joined with morbid emotions and sentiments. It is also important to observe if the moral feelings and passions are perverted, if measured by a common standard, or better still by the patient's former temper and character, and if these are sufficiently morbid to affect the power of self-control. The impulsive form of insanity is to be examined with great care, for under its guise real culprits take shelter to avoid just penal consequences. The strongest evidence of its existence should be made manifest to a medical witness before he testifies to the presence of mental disease in such cases. If these cardinal points are kept in view, an aid to intelligent testimony will be the result.



THE, AMERICAN JOURNAL OF INSANITY.

THE AMERICAN JOURNAL OF INSANITY is published quarterly, at the State Lunatic Asylum, Utica, N. Y. The first number of each volume is issued in July.

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The JOURNAL is now in its thirty-fifth year. It was established by the late Dr. Brigham, the first Superintendent of the New York State Lunatic Asylum, and after his death edited by Dr. T. Romeyn Beck, author of "Beck's Medical Jurisprudence," and since 1854, by Dr. John P. Gray, and the Medical Staff of the Asylum. It is the oldest journal devoted especially to Insanity, its Treatment, Jurisprudence, &c., and is particularly valuable to the medical and legal professions, and to all interested in the subject of Insanity and Psychological Science.